92-1930

Supreme Court, U.S.
FILED
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No. 92-

In The

Supreme Court of the United States

October Term, 1992

WILLIAM GRIFFIN,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IVAN S. FISHER
Attorney for Petitioner
745 Fifth Avenue
New York, New York 10151
(212) 935-7000

Of Counsel:
Kenneth M. Tuccillo

St. Louis & Westervelt, Inc. (3841)
NY (212) 684-3117 NJ (201) 863-8133

QUESTIONS PRESENTED FOR REVIEW

I. Where the main issue at trial was whether the cause of death was grossly negligent medical malpractice or was a stab wound inflicted by the defendant - - was the defendant denied his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution when the court allowed prosecution medical experts to give their opinions that the stab wound was the cause of death, and then excluded defense medical opinions that grossly negligent medical malpractice was the cause of death?

II. Whether the New York rule that medical malpractice must be the "sole" cause of death, and that it is not sufficient that it was a supervening cause, deprived the defendant of his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution.

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In The

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WILLIAM GRIFFIN,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, William Griffin prays that a writ of certiorari issue to review the judgment and opinion entered on February 16, 1993 by the Court of Appeals of the State of New York in the proceedings entitled *People of the State of New York v. William Griffin*, Docket Number 87-0194.

Opinions Below

The opinion of the United States Court of Appeals of the State of New York appears in the Appendix at page 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1993. The jurisdiction of this court is invoked under Title 28, United States Code, § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides that, "[n]o person shall be . . . deprived of life, liberty or property without due process of law . . ."

The Fourteenth Amendment of the Constitution makes the Fifth Amendment applicable to the states and provides that, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

STATEMENT OF THE CASE

Defendant William Griffin appeals from the February 16, 1993 judgment of the Court of Appeals of the State of New York affirming the judgment of conviction entered on February 18, 1988, convicting the petitioner, after a trial (Marks, J. and a jury) of Murder in the Second Degree (New York Penal Law [hereafter P.L.] § 125.25), two counts of Assault in the Third Degree (P.L. § 120.00), and Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01). Petitioner was sentenced to 15 years to life in prison for murder, 1 year for each assault and 1 year for the weapons count. The assault and weapons sentences run concurrently with the sentence for murder. Leave to Appeal to the New York Court of Appeals was granted on April 12, 1992 and on February 16, 1993 the Court affirmed the conviction.

William Griffin, a freshman engineering student at the University of Rochester, had too much to drink one night

and went berserk, wildly and inexplicably stabbing three students in the dormitory. The wounds were serious but curable, and two of the students were properly treated and recovered. The third, Darrell Tornay, had the second misfortune that night of receiving improper - - arguably grossly negligent - - medical care. The attending surgeon failed to perform a simple exploratory surgical procedure - - the Kocher maneuver - - normally performed in stomach wound cases. As a result he failed to find and repair all the damage. An infection was left to "smolder and flare" inside Tornay's stomach. For the next month, all Tornay's symptoms were misinterpreted. When the infection smoldered, the physicians thought he was getting better; when it flared, the symptoms were attributed to something else. Then, during a period of smoldering, he was thought to be cured and released from the hospital. In forty-eight hours he was back, having vomited 4 times.

To compound the initial medical blundering, inadequate care was administered when he returned. Drainage tubes fell out and were not replaced and a week of confusion and inaction followed. Finally it was decided that Tornay had to undergo a second operation. Tragically, he died in the recovery room from an allergic reaction (probably due to the antibiotic) which caused his lungs to clog with fluid, resulting in a heart attack.

Griffin was tried for second degree murder on the theory of reckless conduct creating a grave risk of death combined with depraved indifference to human life (Penal Law § 125.25 (2)).

The defense did not dispute that Griffin stabbed the three students. It wanted to prove that the medical

malpractice was a supervening cause of death, and that Griffin was guilty of assault, not murder. Another contention was that Griffin's reaction to the liquor was unexpected and pathological and was a mitigating factor.

At trial, medical testimony from both sides was predominant and the questions for the jury were primarily of a legal-medical nature. The manner in which the medical testimony went to the jury, what they were allowed to hear and what they were not, and how the jury was instructed by the court on these complex questions constituted the crux of the case. Petitioner was convicted and appealed to the New York Appellate Division and then to the Court of Appeals, both of which affirmed the conviction.

The Court of Appeals summarized the facts and issues it considered:

> The primary issue on this appeal is whether the court erred in precluding expert testimony that medical malpractice was the supervening cause of the victim's death. (App. 1) . . . It was the defendant's contention that Tornay's death was caused not by the stab wound but by medical malpractice in the treatment of the wound. (App. 2) . . . [The medical examiner] testified that the death was related to the stab wound and related to infections resulting from the stab wound. Dr. Cyril Wecht, a defense expert, gave some testimony in the presence of the jury and was also questioned outside of the jury's presence. Subsequently, all of his testimony was stricken and the jury instructed to disregard it. (App. 3) . . . Outside the jury's presence, Dr. Wecht stated that the wound to the duodenum should have been discovered and that the failure to give Tornay adequate care was a supervening cause of death. . . . It is the defendant's claim that the preclusion of the testimony of Dr. Wecht and the limitation of the

testimony of Dr. Stahl were prejudicial and require a new trial. *Id.*

The Court of Appeals then cited as controlling the rule of *People v. Kane*, 213 N.Y. 260:

> It is only where death is attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense. 213 N.Y. at 270.

The appellate court concluded that:

> The test for relief for criminal responsibility for a death applicable to the facts of this case remains *whether the death can be attributed solely to the negligent medical treatment.*
>
> Consequently, while it may have been error to exclude all of the testimony of Dr. Wecht, under the applicable legal standards no showing of prejudice was made.

(App. 7) (emphasis added).

Reasons For Granting The Writ

The New York Court of Appeals relied on a rule that medical malpractice must be the sole cause of death:

> It is only where the death is *solely* attributable to a secondary agency, and not at all induced by a primary one, that its intervention constitutes a defense.

(App. 5, Quoting, *People v. Kane*, 213 N.Y. 260.)

The court made clear that grossly negligent medical

malpractice will not be viewed as a "secondary agency" in such cases. This rule will not pass constitutional muster.

Under the Fourteenth Amendment, this rule "abridge[d] the privileges and immunities of [Mr. Griffin]" and "deprive[d] [him] of life, liberty or property without due process of law". He was denied his right to due process on the issue of causation because the court excluded defense medical opinion on the cause of death while admitting contrary prosecution medical opinion on the same issue. The Court specifically stated that this may have been error, then found that the error did not prejudice Mr. Griffin because he would have had to prove that the medical malpractice was the "sole" cause of death - - proving that it was an intervening cause of death would not have been sufficient:

> The test for relief from criminal responsibility for a death applicable to the facts of this case remains whether the death can be attributed solely to the negligent medical treatment. Consequently, while it may have been error to exclude all of the testimony of Dr. Wecht, under the applicable legal standards no showing of prejudice was made.

(App. 7).

The error was prejudicial. Two serious mistakes were made which denied the defendant a fair and correct assessment of his defense by the jury. First, while the prosecution medical experts were allowed to testify that the cause of death was the stab wound, the defense doctors were not allowed to give their medical opinions that the cause of death was grossly negligent medical malpractice. This ruling was fundamentally unfair and effectively doomed the causation defense.

This is a constitutional question this court should hear. On appeal to the intermediate and the highest courts of the State of New York, Mr. Griffin framed the issue as a denial of his right to Due Process under the United States Constitution, arguing that the refusal of the trial court to permit defense medical testimony on the issue of causation denied his right to a fair trial and to due process:

> It is the appellant's contention that 1) *he was denied a fair trial* because the trial court excluded the defense's expert medical opinion that the death of the decedent was caused by grossly negligent medical malpractice, while at the same time admitting prosecution expert medical opinion that the cause of death was the stab wound.

(Appellant's Brf. at 2) (emphasis added).

* * *

> *The defendant was denied a fair trial* on the issue of causation because the court excluded defense medical opinion on the cause of death while admitting contrary prosecution medical opinion on the same issue.

(App. Brf. at 37) (emphasis added).

* * *

> This disparity in the treatment of the prosecution and defense cases *made a fair trial on the issue of causation impossible*. If the prosecution doctors can give their medical opinions about the cause of death, then *a fortiori* the defense experts must be allowed to disagree with them. Otherwise, the factual issue is taken out of the case. And that is

> exactly what happened here. The defendant was not given the opportunity to present his defense on the only real issue in the case.

(App. Brf. at 39) (emphasis added).

* * *

> Finally, taken separately or together, the exclusion of defense medical experts and the mischarging of the jury on causation, *denied the defendant a fair trial on the question of whether or not he caused the death of the decedent.*

(App. Brf. at 62) (emphasis added).

The New York rule that death must be attributed solely to the medical maltreatment violates due process, is unconstitutional and is at odds with the rule in other states. The generally accepted rule in such cases is that when a victim's death, "results from a series of events too extraordinary or too dependent on the acts of another to be attributed to [the defendant] . . . [he] should not suffer the penalty for murder, nor should he be entirely free of criminal sanctions." LaFave and Scott, Substantive Criminal Law, 1986 (citing cases). *See e.g. People v. Fite*, 627 P.2d 761 (Colo. 1981) (intervening cause sufficient to break causal chain and it need not be sole cause of death); *State v. Sauter*, 585 P.2d 242 (Ariz. 1978); *Wright v. State*, 374 A.2d 824 (Del. Supr. 1977); *State v. Inger*, 292 N.W.2d 119 (Iowa 1980); *State v. Meints*, 322 N.W.2d 809 (Neb. 1982); *State v. Mitchell*, 302 S.E.2d 265 (N.C. App. 1983); *People v. Calvaresi*, 534 P.2d 316 (Colo. 1975); *Baylor v. United States*, 407 A.2d 664 (D.C. App. 1979); *People v. Guilford*, 407 N.E.2d 1094 (Ill. App. 3d Dist. 1980); *State v. Ruekart*, 561 P.2d 580 (Kan. 1977); *People v. Flenon*, 202 N.W.2d

471 (Mich. App. 1972); *State v. Johnson*, 381 N.E.2d 637 (Ohio 1978).

Professor LaFave stated the rule generally followed in most jurisdictions:

> It is generally held that A is guilty of murdering B, i.e. that A's act legally caused B's death, unless the doctor's treatment is so bad as to constitute gross negligence or intentional malpractice.

Substantive Criminal Law, *supra*, § 3.12 (5) (collecting cases).

New York's rule takes the questions of foreseeability and proximate cause entirely out of the picture and makes a criminal defendant strictly liable for anything that happens to the victim, regardless of how grossly negligent the acts of the medical practitioner may be.

The rule of most states, and the one that satisfies the requirements of due process, is if the conduct which actually kills the victim is unforeseeable the defendant's conduct will not be considered the legal cause of death. And, those states agree that the harmful result in question must be the natural and probable consequence of the accused's conduct. If the actual cause of death is unforeseeable, the law will not take cognizance of it. *See* Wharton's Criminal Law, 1992 § 26 (collecting cases).

The states hold that the defendant's conduct must be the proximate cause of death - - not the *sole* cause as required in New York. While the defendant's conduct should be viewed as the proximate cause if the intervening condition was merely a "contributing" cause, the general rule is that grossly negligent medical malpractice may constitute

an intervening or supervening cause which will relieve a defendant of liability for murder (although not for a lesser offense). New York's rule is to the contrary and is unconstitutional. Petitioner was denied his right to a fair trial.

CONCLUSION

For The Reasons Stated a Writ of Certiorari Should be Granted.

Dated: New York, New York
May 10, 1993

Respectfully submitted,

IVAN S. FISHER
Attorney for Petitioner
745 Fifth Avenue
New York, New York 10151
(212) 935-7000

Of Counsel:
Kenneth M. Tuccillo

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October Term, 1992

WILLIAM GRIFFIN,

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-against-

THE STATE OF NEW YORK,

Respondent.

APPENDIX

SIW

St. Louis & Westervelt, Inc. (3841)

Appendix A - Opinion of the Court of Appeals, State of New York, Decided February 16, 1993 [Pages 1a - 6a]

STATE OF NEW YORK

COURT OF APPEALS

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4 No. 19

The People Etc.,

Respondent,

v.

William Griffin,

Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Ivan Stephan Fisher, for appellant.
Robert Mastrocola, for respondent.

SMITH, J.:

In primary issue on this appeal is whether the court erred in precluding expert testimony that medical malpractice was the supervening cause of the victim's death. We conclude that no prejudicial error was committed and that the conviction should not be overturned.

On Sunday, January 18, 1987, the defendant, then a freshman in engineering at the University of Rochester, returned to the campus after a vacation as did other students. During the course of the evening, he drank heavily and, at the time of the criminal incidents, he was under the influence of alcohol. At some point during the evening, the defendant, who was over six feet tall and

weighed more than two hundred pounds, drew a knife and stabbed three people before he was subdued by the campus security personnel. Two of the persons survived although they received cuts which required stitching. One, Gary Kramer, received wounds to his stomach, buttocks and hand. The other Rana Mattreja, received wounds to his stomach. The third person, Darrell Tornay, died about a month after he was stabbed.

It was the defendant's contention that Tornay's death was caused not by the stab wound but by medical malpractice in the treatment of the wound. Much of the evidence at the trial consisted of medical testimony. Tornay had received a single stab wound to his abdomen, located in the upper right quadrant below the rib cage but above the belly button. An exploratory operation (laparotomy) was performed by Dr. Jerry Svoboda. He testified that he found, among other things, that the front and back of the intestine and a blood vessel had been cut. He did not, however, perform a Kocher maneuver, a procedure by which organs behind the abdominal cavity are brought out of that area so they can be examined. Because this was not done, a two millimeter hole in the duodenum was not found. In the weeks following the January 19 operation, Tornay improved slowly. At times, however, there were signs of an infection including a fever. Nevertheless, on the morning of January 31, he was released. That evening Tornay became ill and vomited. He vomited several more times in the next few days and was returned to the hospital on February 2. Over the course of the next two weeks, he was treated for an infection. On February 19, a second operation was performed during which the wound to the duodenum was discovered. During and immediately following the second operation, Tornay experienced increasing difficulty and he

died around 11:45 p.m. on February 19.

The medical examiner, Dr. Lorraine Roth-Mayo, stated that the cause of death was heart failure caused by pulmonary edema. Dr. Roth-Mayo also testified that the death was related to the stab wound and related to infections resulting from the stab wound.

Dr. Cyril Wecht, a defense expert, gave some testimony in the presence of the jury and was also questioned outside of the jury's presence. Subsequently, all of his testimony was stricken and the jury instructed to disregard it. In the presence of the jury the doctor testified that the cause of death was Adult Respiratory Distress Syndrome (ARDS), a condition in which the lungs fill with fluid and do not function properly so that oxygen does not get to the brain and heart. The ARDS was produced by an infection in the blood stream or sepsis and a reaction to a drug given to combat the infection, cefizox. Outside of the jury's presence, Dr. Wecht stated that the wound to the duodenum should have been discovered and that the failure to give Tornay adequate care was a supervening cause of death.

A second expert witness for the defense was Dr. William Stahl. He testified at length about the failure to adequately treat Torney. According to his testimony the acts of negligence included failure to undertake the Kocher procedure, the release of Tornay from the hospital on January 31, failure to give appropriate tests, failure to replace a drainage tube which had fallen and failure to perform the second operation prior to February 19. In responding to a question as to what had happened during the second operation, Dr. Stahl testified that at the close of

the operation and after being moved to the recovery room, Tornay was "in severe pulmonary edema." In partial response as to the meaning of pulmonary edema, the doctor stated the following:

> "And, in fact, he died because of the inability to ventilate him. He died of asphyxia of oxygen lack because the pulmonary edema could not be overcome even with all the treatments that were done."

Objections were then made and sustained to several questions dealing with the cause of death.

It is the defendant's claim that the preclusion of the testimony of Dr. Wecht and the limitation of the testimony of Dr. Stahl were prejudicial and require a new trial. The people contend that no reversible error was committed.

The legal standard of causation applicable here was set forth in *People v. Kane* (213 NY 260). There, this Court held that even though improper medical assistance may have contributed to a death, a defendant whose assault had also been a cause of the death could be held criminally liable. In that case, a pregnant woman was shot twice by the defendant. As the result, she suffered a miscarriage following which septic peritonitis set in. On appeal from defendant's murder conviction, this Court stated that where the improper medical evidence was the sole cause of death, a defendant would not be liable for murder:

> If a felonious assault is operative as a cause of death, the causal co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for the

> homicide. It is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense (213 NY at 270).

The standard announced in *People v. Kane* was applied more recently in *People v. Stewart* (40 NY2d 692). In *Stewart*, this Court reduced a manslaughter conviction to assault in the first degree when the evidence did not clearly establish a knife wound as the cause of death. In fact, the knife wound to the abdomen had been surgically repaired when the doctors noticed "an incarcerated hernia." During the attempt to correct the hernia, the patient went into cardiac arrest and he died a month later. There was expert testimony that the patient would have survived the knife wound if the hernia operation had not been attempted.

Defendant's reliance on *People v. Eulo* (63 NY2d 341, *supra*) is misplaced. In *Eulo*, this court affirmed the separate convictions of two men for manslaughter in the first degree. In both cases, vital organs had been removed from the patients after a cessation of brain function but before the heart had stopped beating. The legal issue was not the cause of death but "what constitutes a person's death, the time at which criminal liability for a homicide would attach" (*People v. Eulo, supra,* at 348). The defendants contended that death had not occurred when the organs were removed and that death was due to the negligence of the doctors. This Court rejected the argument and held that "brain-based criteria" could be used to define death (*People v. Eulo, supra,* at 355).

APPENDIX A
[Opinion - The New York Court of Appeals]

Contrary to the contentions of the defendant herein, *Eulo*, did not change the standard enunciated in *Kane*. As the Appellate Division in this case correctly perceived, dictum in *Eulo* which defendant urges should be construed as establishing a negligence/gross negligence dichotomy on the issue of causation (see, *People v. Eulo, supra*, at 359) was not intended to alter the *Kane* rule. Indeed, the passage defendant relies upon cites *Kane* with approval, and our decision in *People v. Anthony M.* (63 NY2d 270, 280), decided the same day as *Eulo*, makes evident the continuing vitality of *Kane*. The test for relief from criminal responsibility for a death applicable to the facts of this case remain whether the death can be attributed solely to the negligent medical treatment.

Consequently, while it may have been error to exclude all of the testimony of Dr. Wecht, under the applicable legal standards no showing of prejudice was made.

We have considered the defendant's other points and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

* *

Order affirmed. Opinion by Judge Smith. Acting Chief Judge Simons and Judges Kaye, Titone, Hancock and Bellacosa concur.

Decided February 16, 1993

Appendix B - Order of Affirmance of The Appellate Division, Fourth Judicial Department, Entered December 26, 1991

1023

PRESENT: DENMAN, P.J., BOOMER, GREEN, PINE, DAVIS, JJ.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

v.

WILLIAM GRIFFIN, APPELLANT.

The above named William Griffin having appealed to this court from the judgment of the Monroe County Court, entered in the Monroe County Clerk's office on February 19, 1988, and said appeal having been argued by Ivan Fisher of counsel for appellant, Robert Mastrocola of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed.

Opinion by Boomer, J., which is hereby made a part hereof.

CARL M. DARNALL, Clerk

Entered: December 26, 1991

Appendix C - Decision of The Appellate Division, Fourth Judicial Department, Filed December 26, 1991 [Pages 8a - 15a]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 26, 1991

HON. M. DOLORES DENMAN, PRESIDING JUSTICE

HON. JOHN J. CALLAHAN

HON. JOHN H. DOERR

HON. JAMES H. BOOMER

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JOHN P. BALIO

HON. JOHN F. LAWTON

HON. REUBEN K. DAVIS, ASSOCIATE JUSTICES

CARL M. DARNALL, CLERK

1023. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM GRIFFIN, APPELLANT. -- Judgment unanimously affirmed. Opinion by Boomer, J.: After trial, defendant was convicted of murder in the second degree for intentionally causing the death of the victim by stabbing him in the abdomen. The immediate cause of death was acute respiratory distress and massive pulmonary edema caused by an abdominal abscess, which in turn was caused by the stab wound that had perforated the duodenum.

On appeal, defendant primarily contends that the trial court committed reversible error in precluding defendant's medical experts from testifying that the gross negligence of physicians at the hospital where the victim was treated was the superseding cause of the victim's death. The experts were prepared to testify that the treating physicians were grossly negligent in failing to discover the perforation in the duodenum, in releasing the victim from the hospital in spite of signs of infection, in delaying treatment for the infection, and in failing to reinsert a drainage tube. That gross negligence, they concluded, was the superseding cause of death. We hold that the trial court properly excluded that testimony and we affirm the conviction.

Long ago, in *People v. Kane* (213 NY 260, 270), the Court of Appeals recognized the well-established rule that "[i]f a felonious assault is operative as a cause of death, the causal co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for the homicide. It is only where the death is solely attributable to the secondary agency, and not at all induced

by the primary one, that its intervention constitutes a defense. "As authority for that rule, the Court of Appeals cited 2 Bishop on Criminal Law, § § 638, 639: " 'And the doctrine is established, that if the blow caused the death, it is sufficient, though the individual might have recovered * * * had the surgeons treated the wound properly.' (§ 638.) But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise. And it is the same if the wounded person becomes sick and dies of an independent disease, not connected with the wound, which was not mortal. But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death.' (§ 639.)" (*People v. Kane, supra*, at 273-274.)

Later, in *People v. Stewart* (40 NY2d 692), the Court of Appeals, quoting from *People v. Kane, (supra)*, reaffirmed the rule that the intervention of erroneous surgical and medical treatment will not constitute a defense to homicide unless the death is solely attributable to that erroneous treatment and not at all induced by the felonious assault. Thus, the Court concluded, "despite the fact that the defendant had inflicted serious wounds, he could not have been convicted if the death was solely attributable to grossly negligent treatment" (*People v. Stewart, supra,* at 698). The example given in both *People v. Kane (supra,* at 270-271) and *People v. Stewart (supra,* at 698) of a negligent, intervening act that would constitute the sole cause of death, was "the negligent administration of a deadly poison." In *People v. Stewart (supra)*, the assailant who stabbed the victim was held not responsible for the

victim's death where the death was attributable solely to negligence committed during an operation performed at the hospital to correct an incarcerated hernia, a condition not related to the stabbing, and which operation was not made necessary by the stabbing.

More recently, the Court of Appeals reaffirmed the *Kane-Stewart* rule in *Matter of Anthony M.* (63 NY2d 270, 280): "Even an intervening, independent agency will not exonerate defendant unless the death is solely attributable to the secondary agency, and not at all induced by the primary one' (*People v. Kane,* 213 NY 260, 270, *supra*)."

Defendant erroneously contends that *People v. Eulo* (63 NY2d 341), decided the same day as *People v. Anthony M. (supra)*, has changed the rule and that, now, the gross negligence of a treating physician may be a superseding cause of death which exonerates the defendant from the homicide even where that gross negligence is not the sole cause of death. In *People v. Eulo (supra,* at 359), a case dealing primarily with the issue of when death occurs, the Court of Appeal stated that even if the death was prematurely announced because of a doctor's negligence, the subsequent removal of the victim's organs "may have been a cause of death, but that negligence would not constitute a superseding cause of death relieving defendants of liability (see *People v. Stewart,* 40 NY2d 692, 697-698; *People v. Kane,* 213 NY 260, 270)." The Court further stated that "[i]f, however, the pronouncements of death were premature due to the gross negligence or the intentional wrongdoing of doctors, as determined by a grave deviation from accepted medical practices or disregard for legally cognizable criteria for determining death, the intervening medical procedure would interrupt the chain of

causation and become the legal cause of death (see *People v. Kane, supra,* at pp 270-271; see, also, *State v. Scates,* 50 NC 420)" (*People v. Eulo, supra,* at 359). In *State v. Scates (supra)*, the Supreme Court of North Carolina held that a second, independent act, which killed the victim, absolved the perpetrator of the first act for responsibility for the homicide. There, the defendant was burned by one person and later struck by another. He died as a result of the striking and not as a result of the burns.

Neither *Eulo (supra)* nor *Scates (supra)* stands for the proposition that an assailant may be absolved from responsibility for homicide because of the gross negligence of physicians in failing to provide proper treatment. Both cases discussed an intervening act as the superseding cause of death and in both instances the act could be said to be the sole cause of death.

For two reasons, a failure to provide proper medical treatment cannot, as a matter of law, be a superseding cause of death. First, it cannot be the sole cause of death because, in such a case, the death is caused by the cooperation of the initial assault as well as the failure to present that assault form resulting in death. Second, only an intervening act or force can become a supervening cause. In *Miller v. Board of Education, Union Free School, Dist. No. 1, Albion* (291 NY 25, 29-30), the Court stated the rule in civil cases: "'Where the defendant has by his conduct set in motion forces which would not have resulted in harm to another but for the failure of a third person to act or perform some duty which the law imposes upon him the failure on the part of such third person to perform the act does not break the causal relation between the defendant's conduct and the plaintiff's damage' (Harper on Torts, § 115,

p. 264. To the same effect, American Law Institute, Restatement of the Law of Torts [Negligence], §§ 431, 432, 433, 452.) See, also, *Carlock v. Westchester Lighting Co.* (268 NY 345) and American Law Institute, Restatement of the Law of Torts (Negligence), Section 439."

In that respect, the criminal law rule of superseding cause is the same. In *People v. McGee* (31 Cal 2d 229). the California Supreme Court held that the surgeon's neglect, for more than ten hours, grossly contrary to good surgical practice to control the victim's hemorrhage, was not a supervening cause of death: "[D]efendant cannot complain because no force intervened to save him from the natural consequence of his criminal act. The factual situation is in legal effect the same, whether the victim of a wound bleeds to death because surgical attention is not available or because, although available, it is delayed by reason of the surgeon's gross neglect or incompetence. *The delay in treatment is not in fact an intervening force; it cannot in law amount to a supervening cause*" (*People v. McGee, supra*, at 243 [emphasis added]). In *Wright v. State* (374 A2d 824, 829 [Del]), the Delaware Supreme Court, in holding that the malpractice of the treating physician was not a superseding cause of the victim's death, stated: "[A]nother's failure to act cannot save a defendant from the consequences of his criminal act." In *People v. Townsend* (214 Mich 267), the victim died of blood poisoning resulting from injuries inflicted by defendant. Appropriately, the Court wrote: "Defendant cannot be heard to urge in exculpation of his crime that the wounds inflicted through his culpable negligence were not prevented from causing the death by the treatment of the physician" (*People v. Townsend, supra*, at 279).

Many courts of our sister states have also held that an assailant cannot be relieved from responsibility for homicide based on the failure of a third party to provide effective medical treatment unless that treatment constitutes the sole cause of death. For example, in *State v. Jacobs* (194 Conn 119, 125-126, *cert. denied* 469 US, 1190), the Supreme Court of Connecticut wrote: "Gross maltreatment by attending physicians constitutes a defense only in the exceptional case where that maltreatment is the sole cause of the victim's death." In *Jacobs (supra)*, the claimed gross negligence was the failure of the hospital to repair certain injuries to the renal artery and duodenum caused by a bullet wound inflicted by defendant. The Court held that the testimony concerning the claimed gross negligence of treating physicians was immaterial because "the defendant was unable to offer evidence to prove that the claimed gross negligence was the sole cause of death." Many other cases are to the same effect (see, *Wright v. Sauter, supra*; *State v. Bennis*, 457 NW2d 843, 845 [SD]; *State v. Sauter*, 120 Ariz 222; see also, Annotation, Homicide: Liability Whree Death Immediately Results from Treatment or Mistreatment of Injury Inflicted by Defendant, 100 ALR2d 769).

Here, because the proffered evidence of alleged gross malpractice, if believed by the jury, would not relieve defendant from responsibility for the homicide, that evidence was immaterial, and because it was immaterial, it was properly excluded. Although there appears to be no reported case in New York State where a court has held it proper to exclude such, evidence, courts in other jurisdictions have so held (see, e.g., *People v. McGee, supra; State v. Jacobs, supra; Wright v. State, supra*; and other cases cited in the annotation in 100 ALR2d 769, *supra*, at

797-798).

Defendant also contends that the trial court erred in instructing the jury that, in order for erroneous medical treatment to constitute a superseding cause, it must be the only cause of death. For the reasons previously discussed, this contention lacks merit.

Accordingly, defendant's conviction for murder in the second degree should be affirmed. (Appeal from Judgment of Monroe County Court, Marks, J. - Murder, 2nd Degree.) PRESENT: DENMAN, P.J., BOOMER, GREEN, PINE, DAVIS, JJ.